UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 158

Docket No. AT-0353-06-0266-I-2

Blue Youngblood, Appellant,

v.

United States Postal Service, Agency.

August 10, 2009

Blue Youngblood, Hermitage, Tennessee, pro se.

Gillian Steinhauer, Esquire, Memphis, Tennessee, for the agency.

BEFORE

Neil A. G. McPhie, Chairman Mary M. Rose, Vice Chairman

OPINION AND ORDER

The appellant has filed a petition for review (PFR) of the January 30, 2007 initial decision (ID) that denied his request for corrective action, asking that the Board reopen and reconsider his appeal. For the following reasons, we DISMISS the PFR as untimely filed with no showing of good cause for the delay. We also DENY the appellant's request to reopen the appeal.

BACKGROUND

In January 2006, the appellant filed an appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA). He asserted that, in December 2005, the

agency should have restored him after his military service to his previous position as a PS-06/O Full-Time Regular Motor Vehicle Operator with seniority and accumulated benefits, rather than reinstating him to the position of PS-06/A Part-Time Flexible Motor Vehicle Operator. Initial Appeal File (IAF) 1, Tab 1. The agency countered that the appellant was not entitled to restoration under USERRA because his absences from duty due to military service, excluding the allowable exemptions, exceeded the 5 years permitted under 38 U.S.C. § 4312. Specifically, it asserted that the appellant's DD-214, which stated that he was recalled to active duty on September 26, 2001 "in support of Iraqi freedom," could not be used to establish that his 4 years of service from September 26, 2001, until September 26, 2005, were exempt because Operation Iraqi Freedom (OIF) did not begin until March 20, 2003. Id., Tab 5, subtab 1; see also Tab 3. The administrative judge (AJ) dismissed the appeal without prejudice to allow the appellant time to obtain copies of his military orders to support his claim. Id., Tab 7. The appellant subsequently refiled his appeal. IAF 2, Tab 1. The agency again argued that the appellant's non-exempt absences from his position exceeded 5 years. *Id.*, Tab 4.

In his January 30, 2007 ID, the AJ denied the appellant's request for corrective action. ID at 1, 4. The AJ found that, under USERRA, an employee seeking restoration following military service is entitled such restoration/reemployment only if his cumulative service in the military while employed by the agency does not exceed 5 years. The AJ found that, as of August 25, 2001, the appellant had already accumulated 4 years and 7 months of non-exempt absences due to military service. He found that the appellant reenlisted on September 26, 2001, and was absent due to military service for 4 years ending on September 26, 2005. He acknowledged that part of the 4 years, including active military service in support of OIF, was exempt from the 5-year calculation. He found, though, that OIF did not begin until March 20, 2003, despite the notation on the appellant's DD-214. He thus found that the

 $\P 3$

appellant's exempt service in support of OIF from March 20, 2003, until September 26, 2005, reduced the 4 years by 2 years and 6 months of exempt service, but that his non-exempt service still totaled 6 years and 1 month, which exceeded the 5-year limitation for restoration under USERRA. Therefore, he concluded that the appellant did not meet the eligibility criteria for reemployment under USERRA following his last period of military service. *Id.* at 2-4. The ID informed the appellant that it would become final on March 6, 2007, unless a PFR was filed. *Id.* at 4.

On May 31, 2009, the appellant filed a PFR of the ID. PFR File, Tab 1. The Clerk of the Board informed the appellant that his PFR appeared to be untimely and provided him with an opportunity to submit a motion, supported by a statement signed under penalty of perjury or an affidavit, showing that it was timely or that the time limit should be waived. *Id.*, Tab 2. The appellant did not respond to the Clerk's notice. The agency filed a response opposing the PFR. *Id.*, Tab 3.

ANALYSIS

To be timely, a PFR must be filed within 35 days after the ID was issued, or, if the appellant shows that the ID was received more than 5 days after the ID was issued, within 30 days after the date the appellant received the ID. <u>5 C.F.R.</u> § 1201.114(d). The appellant has not asserted that he timely filed his PFR or that he received the ID more than 5 days after it was issued. Therefore, his PFR was over 2 years late.

 $\P 6$

The Board will waive the filing time limit only upon a showing of good cause for the delay. <u>5 C.F.R. §§ 1201.12</u>, 1201.114(f). To establish good cause, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, <u>4</u> M.S.P.R. 180, 184 (1980). The Board will consider the length of the delay, the reasonableness of the appellant's excuse and his showing of due diligence,

whether he is proceeding pro se, and whether he has presented evidence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune that prevented him from timely filing his petition. *Moorman v. Department of the Army*, 68 M.S.P.R. 60, 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

 $\P 7$

As previously noted, the appellant did not respond to the Clerk's notice granting him an opportunity to show good cause for his untimely filing, but in his PFR, he asks the Board to reopen and reconsider his appeal. He asserts that his DD-214 erroneously stated that his military service from September 2001 to March 2003 was part of OIF. He states that he subsequently learned, when he was recalled again to serve from January 2008 to February 2009, that he was covered under USERRA for Operation Enduring Freedom (OEF) beginning October 14, 2001. He thus apparently contends that his service from that date until March 2003 should also be considered exempt, that his total non-exempt service therefore did not exceed 5 years, and, thus, that he had restoration rights under USERRA in December 2005 to his former position. He has attached a DD Form 215, Correction to DD Form 214, dated May 13, 2009, stating that he was recalled to active duty on September 26, 2001, "in support of Operation Enduring Freedom/Operation Iraqi Freedom." PFR File, Tab 1.

 $\P 8$

The appellant has failed to show that he exercised the due diligence or ordinary prudence that would justify waiving the deadline for filing a PFR. Admittedly, the appellant is pro se. However, his delay of over 2 years in filing his PFR is significant. *See, e.g., Smith v. Department of the Army*, 110 M.S.P.R. 50, ¶ 10 (2008). Moreover, the ID informed him of the March 6, 2007 deadline for filing a PFR. ID at 4. The Board has declined to find good cause for an untimely filing where, as here, the ID clearly notified the appellant of the time limit within which to file his PFR. *See, e.g., Crook v. U.S. Postal Service*, 108 M.S.P.R. 553, *aff'd*, 301 F. App'x. 982 (Fed. Cir. 2008).

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The appellant apparently bases his request for reopening on allegedly new and material evidence, i.e., the May 13, 2009 correction to his DD-214 showing that he was recalled on September 26, 2001, in support of OEF. To constitute new and material evidence, however, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed. See Grassell v. Department of Transportation, 40 M.S.P.R. 554, 564 (1989). Here, the appellant has not shown that he exercised due diligence in correcting his military records or in pursuing his appeal. In that regard, the agency notified the appellant in February 2006 of its view that his DD-214, which stated that his 4 years of service from September 2001 to September 2005 was in support of Iraqi Freedom, was invalid because OIF did not begin until March 20, 2003. IAF 1, Tab 5, subtab 1 at 6. Indeed, as previously noted, the AJ dismissed the appellant's appeal without prejudice in 2006 to allow him to obtain military orders to show that his service from 2001 through 2005 was exempt from the 5-year limitation. Id., Tab 7. The appellant has not explained why he did not then attempt to obtain a corrected DD-214. Further, after he refiled his appeal, he submitted a September 30, 2002 letter from the Department of the Navy to the agency, stating, inter alia, that he would be released from active duty upon completion of appropriate administrative processing, and that "[h]is services in support of Operations Noble Eagle and Enduring Freedom were great[ly] appreciated and highly commendable." IAF 2, Tab 5 at 7. Again, he has not explained why he did not attempt to obtain a corrected DD-214 at that point.

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Moreover, even if the appellant's ignorance of any coverage under OEF was excusable until his January 2008 to February 2009 service, he has not stated when during that service he learned of the error in his DD-214 and when he attempted to have it corrected. In any event, he apparently waited at least from his February 2009 discharge, at which time he admittedly knew of the error, until May 31, 2009, i.e., at least 3 months, to file a PFR or request reopening.

Delaying the filing of a PFR to collect documentation does not constitute good cause to excuse a delay. See, e.g., Smith, 110 M.S.P.R. 50, ¶ 13. Thus, his failure to file a PFR or a request for reopening, or to ask for an extension of time, shows that he did not exercise due diligence. Id., ¶ 12.

- In addition, we find no basis for reconsidering or reopening the appeal. In deciding whether to reopen a closed appeal, the Board will balance the desirability of finality against the public interest in reaching the right result and will exercise its authority to reopen only in unusual or extraordinary circumstances. Generally a request to reopen must be filed within a reasonable period of time, measured in weeks, not years. *See, e.g., Smith*, 110 M.S.P.R. 50, ¶ 15. Here, the appellant filed his reopening request over 2 years after the ID was issued, and, at the very least, 3 months after he learned of the error in his DD-214. Finally, the Board will not normally reopen an appeal to cure an untimely PFR. *Id*.
- ¶12 For the foregoing reasons, we dismiss the PFR as untimely and deny the request to reopen. Therefore, we need not address the merits of the appeal. *See*, e.g., *Smith*, 110 M.S.P.R. 50, ¶ 14 n.*; *Crook*, 108 M.S.P.R. 553, ¶ 7.

ORDER

This is the final decision of the Merit Systems Protection Board concerning the timeliness of the appellant's petition for review. The initial decision remains the final decision of the Board concerning the denial of the appellant's request for corrective action. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

7

United States Court of Appeals for the Federal Circuit 717 Madison Place, N.W. Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer Clerk of the Board Washington, D.C.